No. 76-1058

Supreme Court, U. S.
FILED
FEB 1 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1976

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SHARON L. KING
One First National Plaza
Suite 4200
Chicago, Illinois 60603
Counsel for Petitioner

Of Counsel:
ROBERT E. CRONIN
GERALD D. MINDELL
THOMAS G. RYAN
ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603
(312) 786-7500

The Scheffer Press, Inc.—(312) 263-6850

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Central Illinois Public Service Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned case on August 17, 1976.

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Appendix A, *infra*, pp. 1a-4a) are reported at 405 F.Supp. 748 (S.D.Ill. 1975). The opinion of the court of appeals (Appendix B, *infra*, pp. 5a-12a) is reported at 540 F.2d 300.

JURISDICTION

The judgment of the court of appeals (Appendix C, *infra*, p. 13a) was entered on August 17, 1976. A timely petition for rehearing was denied on November 4, 1976 (Appendix D, *infra*, p. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Sections 3401 and 3402 of the Internal Revenue Code of 1954 require an employer to withhold federal income taxes only on a payment of "wages". "Wages" are defined in the statute to mean "remuneration . . . for services performed".

The questions presented are: (i) whether virtually all payments deemed to arise out of, or be attributable to, the employment relationship, such as petitioner's payments to reimburse noon meal expenses of its employees when they were traveling on petitioner's business, constitute "wages" for withholding tax purposes, as the court of appeals held; and (ii) whether withholding tax obligations may be retroactively imposed on an employer as a matter of law, as the decision below in effect held, as to payments which subsequently may be deemed to be "wages".

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Internal Revenue Code (26 U.S.C. 3401(a) and 3402(a)) and Treasury Regulations (Section 31.3401(a)-1) appear in pertinent part in Appendix E to this Petition (pp. 15a-16a, *infra*).

STATEMENT OF CASE

Petitioner is a public utility which, in the year 1963, reimbursed its employees, in accordance with its established policy, for legitimate travel expenses incurred in required trips for the Company's business. These payments included reimbursements for transportation, meals and lodging. Petitioner treated all of these payments as not being wages and did not withhold federal income taxes from them (Appendix A, *infra*, pp. 2a-3a).

The government contended that petitioner should have withheld on the portion of these reimbursements which was for noon meal expenses incurred on those trips which did not involve an overnight stay and assessed additional withholding taxes against petitioner. The amount of the additional withholding taxes and interest assessed for the four taxable quarters in 1963 amounted to $25,188.50 of taxes and interest of $11,427.22 (Appendix A, *infra*, p. 3a). Petitioner paid this amount and brought suit for refund.

The district court upheld petitioner's claim for refund (Appendix A, *infra*, pp. 1a-4a); the court of appeals reversed (Appendix B, *infra*, pp. 5a-12a).

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with *Royster Company* v. *United States*, 479 F.2d 387 (4th Cir. 1973). The court in *Royster* held, on facts "not meaningfully distinguishable" as specifically acknowledged by the court below,[1] that payments by an employer to salesmen to reimburse them for noon meal expenses incurred on non-overnight business trips for the employer did not constitute wages for withholding purposes. Contrary to the Fourth Circuit, the court below embraced the proposition that virtually all payments attributable to the employment relationship constitute remuneration for services performed and, therefore, are "wages" for withholding tax purposes. Indeed, the Seventh Circuit took the view that any other definition would be too narrow.

Resolution of the conflict by this Court of the recurring federal tax question of the meaning of "wages" is essential in order that uniform withholding standards may apply to employers throughout the nation and that employers will know in advance what these standards are.

2. Section 3402(a) of the Code requires an employer to withhold *only* upon payments of "wages", which are defined in Section 3401(a) as "all remuneration . . . *for services performed* by an employee for his employer. . . ." [Emphasis supplied.] However, the court of appeals held

[1] 540 F.2d at 302. The opinion of the court below was amended on September 2, 1976, to state in a footnote that ". . . no active judge favored a rehearing *in banc* on the question raised by the conflict of this opinion with that of the Fourth Circuit in *Royster* v. *United States*, 479 F.2d 387 (1973)."

that wages for withholding purposes include the "total package of remuneration, including salary, pension, paid vacation time and other remuneration. . . ."[2]

Obviously, all payments and benefits to an employee from the employer are attributable to the employment relationship and the employer's expectation that its employee will perform services for it; but never before has it been held that all payments and benefits to an employee constitute "wages", *i.e.*, remuneration for services performed. The decided cases have refused to hold that a variety of payments to an employee constitute "wages" subject to withholding.[3] Further, administrative practice over the years, made known through official interpretations outstanding for decades, recognizes that not every economic benefit provided to employees by their employer, including supper money for employees who work over-

[2] 540 F.2d at 302. The Fourth Circuit in *Royster* expressly rejected the position accepted by the court below because it "render[s] nugatory any distinction between" wages and income. 479 F.2d at 390.

[3] *See, e.g., Allstate Ins. Co.* v. *United States*, 530 F.2d 378 (Ct. Cl. 1976); *Stubbs, Overbeck & Associates, Inc.* v. *United States*, 445 F.2d 1142 (5th Cir. 1971); *Humble Oil & Refining Co.* v. *United States*, 442 F.2d 1362 (Ct. Cl. 1971); *Humble Pipe Line Co.* v. *United States*, 442 F.2d 1353 (Ct. Cl. 1971); *Peoples Life Ins. Co.* v. *United States*, 373 F.2d 924 (Ct. Cl. 1967); *Acacia Mutual Life Ins. Co.* v. *United States*, 272 F.Supp. 188 (D.Md. 1967). Further, contrary to the apparent conclusion of the court of appeals, Section 3401(a) specifically excludes from "wages" all payments from qualified pension, profit-sharing and stock-bonus plans, even though such payments represent taxable income to the employee.

time, represents even taxable income—much less wages—to the employee.[4]

In addition, as observed by the Treasury Department in the Summary and Explanation cited in note 4, *supra*, in discussing withholding on fringe benefits (at p. J-9): "If we should attempt to include in the withholding base every economic benefit enjoyed by great numbers of employees, the operation of the system would be seriously jeopardized." The difficulties extend not only to the valuation of non-cash items but to determining the amount of cash items subject to withholding.[5]

Whether the view of the *Royster* court or that of the court below is the proper interpretation of "wages" should

[4] *See, e.g.*, O.D. 514, 2 Cum Bull. 90 (1920); Treasury Regulations §1.119-1(a)(2)(i); Discussion Draft of Proposed Regulations §1.61-16 on Employee Fringe Benefits, 40 Fed. Reg. 41118-22 (9/5/75); and Summary and Explanation of Discussion Draft of Proposed Regulations on Fringe Benefits. Daily Tax Report of September 4, 1975 (pp. J-5 through J-9), published by the Bureau of National Affairs, Inc. On December 17, 1976, Treasury Secretary Simon, in withdrawing the Discussion Draft, commented:

> "The myriad forms in which fringe benefits are provided and the difficulty of valuing those benefits, together with the undesirability of mandating the keeping of additional detailed records by employers and employees in certain cases, with the attendant costs and complexities involved, have caused me to conclude that the discussion draft should be withdrawn."

[5] Because of other offsetting deductions allowed to an employee, federal income taxes may not even be owed on the amount of meal reimbursements. *See* Rev. Rul. 69-592, 1969-2 Cum. Bull. 193. Apparently, on this basis, even the government does not withhold on per diem allowances for non-overnight trips. *See* Tax Management Memorandum, TMM 75-03, dated February 3, 1975, published by the Bureau of National Affairs.

be resolved by this Court at this time. Otherwise, the decision below is likely to encourage widespread litigation and uncertainty as to an employer's obligation to withhold upon employee payments and benefits attributable to the employment relationship.

3. The court below also erred by holding in effect that petitioner should be subject retroactively to the imposition of federal withholding tax obligations. The retroactive imposition of a withholding obligation is of particular concern because an employer, under the withholding tax provisions, is merely a conduit for the government in collecting federal taxes. The employer should not be forced to be in effect a guarantor of any federal tax deficiencies of its employees as a consequence of a subsequent decision denying a deduction to such employees.

As the record shows, it was reasonable for petitioner to believe that the payments in question were not "wages". First, these payments were in furtherance of the petitioner's business and, as the district court found, were not for services performed. Further, prior to the year the payments in question were made, the Eighth Circuit in *Hanson* v. *Commissioner*, 298 F.2d 391 (8th Cir. 1962), allowed a federal income tax deduction in the amount of meal expenses incurred during business trips which did not require the taxpayer to be away overnight. *In Ahrens* v. *United States*, 264 F.Supp. 518 (S.D. Ill. 1967), the court similarly allowed such a deduction to one of petitioner's own employees for noon meal expenses incurred by him in the year 1962 while on non-overnight trips for petitioner for which he was reimbursed.

While the deduction was subsequently disallowed in *United States* v. *Correll*, 389 U.S. 299 (1967), this Court did not hold the payments to be "wages" or subject to

withholding. Indeed, this Court's holding in *Correll* is based upon administrative convenience and does not suggest that any basis exists for treating the denial of the deduction as somehow resulting in the creation of a "wage" item.

By its decision below, the court of appeals has inequitably sanctioned the retroactive imposition of withholding tax and interest upon the petitioner, apparently as a matter of law, though petitioner had reason to believe it had no such withholding tax obligation. Even the Internal Revenue Service has not sought to go so far. *See* Rev. Rul. 69-592, 1969-2 Cum. Bull. 193. The question of an employer's potential liability to pay past taxes resulting from reimbursements not believed to be "wages" at the time paid should be decided by this Court to minimize the inequitable risks otherwise imposed upon employers in an atmosphere of considerable uncertainty. Where the withholding tax is involved, an employer is entitled to the clearest advance direction.

4. Both issues raised herein, namely the expansive definition given the term "wages" for purposes of withholding and the potential liability of an employer for retroactive imposition upon it of withholding tax obligations for payments belatedly characterized as "wages" are of wide significance and relevance. We believe that numerous companies have some type of meal reimbursement program in the furtherance of their businesses. In fact, prior to the time of preparing this Petition, the American Gas Association, an industry group comprised of more than 300 members (including gas distribution companies, combination gas and electric companies and gas transmission companies), announced that it would seek to file an amicus curiae brief in this case if certiorari is granted

because of the importance of the issues to its member companies.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SHARON L. KING
ROBERT E. CRONIN
GERALD D. MINDELL
THOMAS G. RYAN
ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603
(312) 786-7500
Counsel for Petitioner

APPENDIX

Appendix A. Findings of Fact and Conclusions of Law of the District Court, 405 F.Supp. 748.

Appendix B. Opinion of the Court of Appeals, 540 F.2d 300.

Appendix C. Judgment of the Court of Appeals.

Appendix D. Denial of Petition for Rehearing.

Appendix E. Relevant Statutes and Regulations.

APPENDIX A

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

Civ. No. 4920.

United States District Court,
S. D. Illinois, S. D.

Dec. 29, 1975.

Suit was brought by corporate employer for refund of deficiency assessed by federal government for additional withholding taxes and interest in connection with certain lunch payments to employees. The District Court, Harlington Wood, Jr., J., held that where employees, who were paid depending on their classification either $1.40 or actual lunch expenses for lunches eaten away from company while on company business, rendered no service to company during noon hour, lunch payments were unrelated to employee's specific job title, nature of his work or rate of pay, and payments could hardly be considered money making proposition for employees, such payments were not "wages" for services rendered and thus did not require withholding by employer.

Judgment for plaintiff.

Internal Revenue—1766.3

Where employees, who were paid depending on their classification either $1.40 or actual lunch expenses for lunches eaten away from company while on company business, rendered no service to company during noon hour, lunch payments were unrelated to employee's specific job title, nature of his work, or rate of pay, and as practical

matter such payments could hardly be considered money making proposition for employees, such payments were not "wages" for services rendered and thus did not require withholding by employer.

Sharon L. King, Isham, Lincoln & Beale, Chicago, Ill., for plaintiff.

Nafzinger & Otten, Kenneth H. Otten, Springfield, Ill., Michael von Mandel, Trial Atty., Tax Div., Dept. of Justice, Washington, D. C., Donald B. Mackay, U. S. Atty., Springfield, Ill., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HARLINGTON WOOD, JR., *District Judge.*

This case was tried before the Court without a jury. Thereafter counsel filed briefs.

The issue is found for Plaintiff and against the Defendant.

That only issue is whether or not the Internal Revenue Code of 1954 required that the Plaintiff company withhold taxes on payments it made on occasion to some of its employees for lunch. If an employee was away from home and travelling on the company's business during the day and ate lunch wherever he was without returning for that purpose, the company paid the employee in one classification an amount not to exceed $1.40, and certain other employees an amount as reimbursement for the actual cost of the lunch. These classifications related only to the particular geographical division of the company where the employee worked, or his union status and are not relevant to the tax question. Overnight trips also are not involved. The company considered the lunch payments to be travel expenses not subject to withholding and therefore nothing was withheld by the company on these payments. The Government claims however that these lunch payments were additional wages and therefore subject to withholding. The Government assessed a deficiency against

the company in 1971 for additional withholding taxes together with interest for four taxable quarters in 1963 amounting to $25,188.50 in taxes with $11,427.22 in taxes, or a total amount of $36,615.72. The company paid this amount and brings this suit for refund.

There appears to be little dispute about the underlying facts.

The company is an Illinois corporation having its principal office in Springfield, Illinois, and is a public utility engaged in the generating, transmissions, distribution and sale of electric energy and the distribution and sale of natural gas in Illinois.

The company reimbursed its employees for legitimate travel expenses which included these lunch payments in accordance with its established policy. If the employee was on a required trip for the company's business, the employee made an accounting on a company form which he turned in to his supervisor for approval followed by payment by the company. For employees in one category this was not to exceed $1.40 regardless of the cost of the lunch, and for others the amount was reimbursement for actual lunch expenses. The evidence disclosed that depending on the individual and the circumstances the $1.40 rate was sometimes in excess of the actual lunch cost, but very often it was insufficient to cover the cost. Depending on where the employee was assigned on a particular day some would go home for lunch and thus not be entitled to the reimbursement; however, these employees who took their lunch from home with them on a company trip were also entitled to the payment. Even in 1963 the $1.40 rate was modest considering that many of these employees were men engaged in open air labor. As a practical matter, it could hardly be considered a money making proposition for an employee.

There are facts which this Court believes distinguishes this case from the case of the usual employee who leaves his office at noon to go out for lunch. The employee in

the present case is away from home in travel status. He renders no service to the company during his lunch. Usually the employee would not be at the actual work site, but at a restaurant in the vicinity. He was off duty during this time. His time was his own. The employee was, however, subject to call during the noon hour, but all the employees in this public utility business were generally subject to call, not just during the lunch break, at any time as emergencies might require. These lunch payments were unrelated to the employee's specific job title, the nature of his work or rate of pay. It appears that this lunch payment arrangement was beneficial and convenient for the company and served its business interest. It saved the company employee time otherwise spent in travelling back and forth as well as the usual travel expenses.

Against this factual background this Court is of the opinion that the Government's view that these payments were "wages" in this particular case requires a departure from the realities of business life and a vigorous stretching of the statute to try to include the lunch payments as being for services rendered to the company. *U. S.* v. *Correll*, 389 U.S. 299, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967) relating to deductibility of travel expenses by an employee does not thereby automatically require withholding by the employer. The present case is not one where the company is asking that the Federal Treasury help finance its employees' meals.

There are some noncritical factual distinctions but this Court is persuaded by the views expressed in *Royster* v. *U. S.*, 479 F.2d 387 (4th Cir. 1973). The payments there under somewhat similar circumstances were held not to be remuneration for services performed to the employer. I believe the situation in this present case is substantially the same.

Therefore, the Plaintiff shall have judgment in the amount of $36,615.72 together with interest thereon.

APPENDIX B

CENTRAL ILLINOIS PUBLIC SERVICE CO.,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

No. 76-1277.

United States Court of Appeals,
Seventh Circuit.

Argued June 9, 1976.

Decided Aug. 17, 1976.*

As Amended Sept. 2, 1976.

Corporate employer brought suit for refund of deficiency assessed for additional withholding taxes and interest in connection with certain lunch payments to employees. The United States District Court for the Southern District of Illinois, Harlington Wood, Jr., J., 405 F.Supp. 748, rendered judgment against the Government, and it appealed. The Court of Appeals, Sprecher, Circuit Judge, held that reimbursements for employees' lunches eaten while on nonovernight trips away from their home areas constistituted "wages" under the income tax withholding provisions, and tax on those reimbursements thus had to be withheld by the employer.

Reversed.

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* This opinion has been circulated among all judges of this court in regular active service. Tone and Harlington Wood, Jr., Circuit Judges, not participating, no active judge favored a rehearing *in banc* on the question raised by the conflict of this opinion with that of the Fourth Circuit in *Royster* v. *United States*, 478 F.2d 387 (1973).

1. Internal Revenue—1766.3

Reimbursements for employees' lunches eaten while on nonovernight trips away from their home areas constituted "wages" under the income tax withholding provisions, and tax on those reimbursements thus had to be withheld by the employer. 26 U.S.C.A. (I.R.C.1954) § 3401(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Internal Revenue—555

Reimbursements made for meals on a nonovernight trip are nondeductible income.

3. Internal Revenue—341

Not all payments constituting income to an employee fall into the category of remuneration for employees services or "wages." 26 U.S.C.A. (I.R.C.1954) § 3401(a).

Scott P. Crampton, Asst. Atty. Gen., Alfred S. Lombardi, Atty., Tax Div., Dept. of Justice, Washington, D. C., Donald B. MacKay, U. S. Atty., Springfield, Ill., for defendant-appellant.

Sharon L. King, Chicago, Ill., for plaintiff-appellee.

Before FAIRCHILD, Chief Judge, and SWYGERT and SPRECHER, Circuit Judges.

SPRECHER, Circuit Judge.

[1] This case concerns whether reimbursements for employees' lunches eaten while on non-overnight trips away from their home areas are considered "wages" under the income tax withholding provisions, 26 U.S.C. § 3401(a) and thus whether tax on these reimbursements must be withheld by the employer.

I

Central Illinois Public Service Company (the company), a public utility, supplies electricity and natural gas to an extensive area of downstate Illinois. Because of the size of its service area, employees often have to travel away from their home base, both on day trips during normal business hours and on overnight trips. The company, in accord with a longstanding policy, reimburses its employees for legitimate expenses of transportation, meals and lodging when traveling on company business. In the present case, only reimbursements made for lunches eaten away from employee's normal duty area during nonovernight trips are at issue.

The company reimburses employees for these lunches if they are taken away from their normal work stations or job sites at the time of their noonday meal. The amount of reimbursement depends upon the employee's status. Union employees and operating employees of the Western Division (the only division of the company as yet ununionized) receive a flat rate of $1.40 per noonday meal eaten away from their normal post of duty. This is provided for in the union's collective bargaining agreement. The full $1.40 can be, and often is, claimed regardless of the amount actually spent on lunch—in many cases the reimbursement is claimed even when the employee brings his lunch from home. Other employees—those on a salaried basis—are reimbursed for their actual expenses up to $25 per meal. During 1963, the Tax year in question, the company paid its employees $139,936.12 in reimbursements for such noonday meals. The company did not withhold income tax for its employees with respect to this sum.

In 1971, the District Director of Internal Revenue Service assessed against the company withholding taxes for these noon-meal reimbursements (plus interest thereon) totaling $36,615.72. The company paid the sum and sued for a refund. The district court held that the reimbursements were not "wages" under 26 U.S.C. § 3401(a) relying primarily on a case from the Fourth Circuit, *Roy-*

ster Co. v. *United States*, 479 F.2d 387 (4th Cir. 1973). Thus it held that the reimbursements were not subject to withholding for income tax purposes and rendered judgment for the plaintiffs. The government appealed.

II

Under the Internal Revenue Code provisions requiring collection of income tax at its source, 26 U.S.C. §§ 3401 *et seq.*, an employer must withhold from an employee and pay to the government a certain portion of the employee's "wages." Section 3401(a) defines "wages" as "all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash . . . ." The regulations further make clear that the name by which the remuneration is designated is immaterial, as is the basis upon which it is paid.[1] The question which this case presents is whether reimbursements for noon meals on non-overnight trips constitute "wages" as so defined.

[2, 3] Clearly, these reimbursements are non-deductible income to the employees. In *United States* v. *Correll*, 389 U.S. 299, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967), the Supreme Court upheld the ruling of the Commissioner

[1] Treas.Reg. § 31.3401(a)-1(a) provides:

(1) The terms "wages" means all remuneration for services performed by an employee for his employer unless specifically excepted under section 3401(a) or excepted under section 3402(e).

(2) The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of the statute if paid as compensation for services performed by the employee for his employer.

(3) The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and may be paid hourly, daily, monthly, or annually.

(*see, e. g.*, Treas.Reg. § 1.162—17(b)(3)(ii)) that expenses incurred for meals on business trips are deductible only if the trip requires sleep or rest (i. e., and overnight stay). Thus, these reimbursements made for meals on a non-overnight trip are non-deductible income. *Wilson* v. *United States*, 412 F.2d 694 (1st Cir. 1969) (reimbursement for "mid-shift" meal of state trooper, given if the trooper was more than 10 miles from home barracks, held non-deductible income). However, as the government concedes, not all payments constituting income to an employee fall into the category of remuneration for employee services or "wages."

The Supreme Court although not having interpreted this particular section, on at least two occasions has given broad definition to that which constitutes remuneration for employee services. In *Commissioner* v. *LoBue*, 351 U.S. 243, 247, 76 S.Ct. 800, 803, 100 L.Ed. 1142 (1956), the Court wrote:

> When assets are transferred by an employer to an employee to secure better services they are plainly compensation. . . . LoBue received a very substantial economic and financial benefit from his employer prompted by the employer's desire to get better work from him. This is "compensation for personal service" within the meaning of § 22(a).

And in *Social Security Board* v. *Nierotko*, 327 U.S. 358, 365-66, 66 S.Ct. 637, 641, 90 L.Ed. 718 (1946), the Court wrote:

> We think that "service" . . . means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.

These statements lead us to agree with the view taken by the Second Circuit in *Educational Fund of the Electrical Industry* v. *United States*, 426 F.2d 1053 (2d Cir. 1970). In that case, the question presented was whether $140 paid to electricians in lieu of wages for successfully

attending a one-week course at a school established by the union constituted "wages" for withholding purposes. The court held that it did.

> The $140 payments to those who attended the school represented part of the benefit package which was negotiated as part of the wage structure under the collective bargaining agreement in effect between the employers and the union as representative of the electrical workers. The payments ultimately derived from the employers and represented a portion of the agreed upon remuneration for services performed by the employees within the intent of Section 3401(a), just as do payments from pension and vacation funds.

Id., at 1056. This expansive definition of "wages" seems appropriate and harmonizes well with the underlying purposes of the withholding tax system to collect income at its source and to prevent unexpected burdensome tax liabilities come April 15.[2]

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[2] This view accords well with the legislative history of a similar provision, the definition of "wages" under the social security tax system, 26 U.S.C. § 3121, a definition held to have "the same essential meaning" as that for withholding. *Royster Co.* v. *United States,* 479 F.2d 387, 390 (4th Cir. 1973) The House Report on the initial Social Security Bill, H.R. 7260, 74th Cong., 1st Sess., stated:

> Wages include not only the cash payments made to the employee for work done, but also compensation for services in any other form, such as room, board, etc.

H.R.Rep. No. 615, 74th Cong., 1st Sess., p. 32 (1939—2 Cumm.Bull. 600, 606). The Senate Report contained similar language:

> The term "wages" is defined to mean all remuneration for employment, including the cash value of all remuneration paid in any other medium than cash. *That is, in addition to money payments, it includes payments in kind, rent, food, lodging, etc.*

S.Rep. No. 628, 74th Cong., 1st Sess., p. 49 (1939—2 Cum. Bull. 611, 623) (emphasis supplied).

Having found this view appropriate, the opinion of the Fourth Circuit in *Royster Co.* v. *United States,* 479 F.2d 387 (4th Cir. 1973), appears unpersuasive. The court in *Royster* held that payments to salesmen to reimburse them for the cost of their noon meals while in their sales territory did not constitute "wages" for withholding purposes. The government concedes, as it must, that *Royster* is not meaningfully distinguishable from the present case. The *Royster* court took a narrow view of the meaning of "remuneration for services" holding that because the salesmen "performed no services while eating, directly or indirectly," the reimbursement for the meal was not remuneration for services. *Id.,* at 391.

Remuneration for services cannot be viewed this narrowly. The employment relationship is a two-sided bargain, with the employee's services being given for a total package of remuneration, including salary, pension, paid vacation time and other remuneration such as reimbursed lunches. Clearly, in the present case, the employer had no obligation to pay for employee lunches. And certainly, the employee gains by the payment; otherwise, the employee would have to pay for lunch himself. If cannot be doubted that the lunch reimbursements are part of a total package of remuneration designed to attract and hold good employees to the company. As such, they must be considered "wages" under 26 U.S.C. § 3401(a) for withholding tax purposes.[3]

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[3] The company agrees that whatever these reimbursements are classified as, they are still excludable under Treas.Reg. § 31.3401(a)-1(b)(2) concerning traveling expenses. The regulation provides in relevant part:

> Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding.

However, to be travel expenses, the employee must be on travel status; that is, he must be on an overnight trip.

Since the noon meal reimbursements at issue in this case are "wages," the employer is liable for withholding tax on them. Thus, the assessment of the District Director against the company was proper. The judgment of the district court is reversed.

Reversed.

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[3] (Continued)
United States v. *Correll*, 389 U.S. 299, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967). Here the employees were not traveling overnight, and thus, the reimbursements were not travel expenses. Nor were the reimbursements necessary business expenses, for an employee's lunch without more, is not an "ordinary and necessary expense . . . incurred in the business of the employer."

APPENDIX C

Opinion by Judge Sprecher

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 17, 1976
Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

CENTRAL ILLINOIS PUBLIC SERVICE CO.,
Plaintiff-Appellee,

No. 76-1277 vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois
Civil No. 4920
HARLINGTON WOOD, JR., *Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 4, 1976

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

HON. ROBERT A. SPRECHER, *Circuit Judge*

CENTRAL ILLINOIS PUBLIC SERVICE CO.,
Plaintiff-Appellee,

No. 76-1277 vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

No. 4920

HARLINGTON WOOD, JR., *Judge*

On consideration of the petition for rehearing filed in the above-entitled cause, all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing in the above-entitled cause be, and the same is hereby, DENIED.

APPENDIX E

Internal Revenue Code of 1954:

SEC. 3401. Definitions.

(a) Wages.

For purposes of this chapter, the term "wages" means all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash . . . .

• • • • • •

(26 U.S.C. 1958 ed., Sec. 3401)

SEC. 3402. Income tax collected at source.

(a) Requirement of withholding.

Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables. . . .

• • • • •

(26 U.S.C. 1958 ed., Sec. 3402)

Treasury Regulations:

Sec. 31.3401(a)-1 Wages—

(a) In general.

(1) the term "wages" means all remuneration for services performed by an employee for his employer unless specifically exempted under section 3401(a) or excepted under section 3402(e).

• • • • •

(b) Certain specific items—

• • • • •

(2) Traveling and other expenses.

Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

• • • • •

(T.D. 6259, 1957-2 Cum. Bull. 645)

Sec. 31.3121(a)-1 Wages—

• • • • •

(h) Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

• • • • •

(T.D. 6516, 25 Fed. Reg. 13032 (12/20/60))